RECORD
AND
BRIEFS

FILED
APR 17 2017

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LIBERTY, LIFE, AND LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Liberty, Life, and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to grant the Petition for a Writ of Certiorari and reverse the decision of the Ninth Circuit.

LLLF is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to life, liberty, and the rule of law. LLLF participated as *amicus curiae* in many of the cases challenging the HHS contraception mandate. LLLF's founder, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The mission of Petitioners is advocacy—not commerce or the practice of a profession. Their message is religious expression on a matter of intense public concern. Their method is to offer free information and other resources. The State's alleged mission is to

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

prevent deception and ensure that women are informed about their full range of reproductive choices. But that mission is betrayed by its method. Rather than using its own voice to disseminate its own message—which advocates only *one* choice (abortion)—California hijacks the Centers as its couriers.

Compelled speech is anathema to the First Amendment. The Ninth Circuit parted company with this Court and other circuits when it upheld California's Reproductive FACT Act (Cal. Health & Safety Code §§ 123471, 123472, 123473) (the "Act"). Its ruling, if allowed to stand, empowers government to bludgeon free speech.

ARGUMENT

I. THE NINTH CIRCUIT OBSTRUCTS THE CENTERS' ABILITY TO CARRY OUT THEIR *MISSION*.

Petitioners are pregnancy resource centers (the "Centers") whose mission is to offer life-affirming alternatives to abortion. The State has a competing mission. Allegedly the State seeks to ensure that women are fully informed—but in reality it aggressively promotes abortion and suppresses information about alternatives. *The State treats the religious nonprofit Centers as commercial enterprises and ignores their mission*. The State's mission, if successful, would ensure that many Centers fail to accomplish their mission. Indeed, the State openly concedes its intent to target the Centers because of their pro-life viewpoint. Through a scheme of broad exemptions, the State cherry-picks pro-life centers and deliberately thwarts their mission. The end result is

that the only entities legally required to promote abortion are those who oppose it.

Incredibly, the Ninth Circuit insists the Act does not "encourage, suggest, or imply that women should use those state-funded services." *Nat'l Inst. of Family & Life Advocates v. Harris*, 2016 U.S. App. LEXIS 18515, *39 (9th Cir. 2016) ("*NIFLA v. Harris*"). This is an astounding denial of reality. If California does not intend to "encourage, suggest, or imply" that women should use state-subsidized abortion services, then it makes no sense to commandeer the Centers to advertise them. The Centers subsidize life-affirming alternatives to abortion. The State subsidizes abortion—then uses its superior resources and power to impede the Centers' mission.

The State essentially compels the Centers to abandon their mission. Either they must comply with the law and direct women to state-subsidized abortions, or they must enroll in a regime (the Family PACT program) that would mandate their participation in abortion-related drugs and services. Both options are constitutionally flawed.

II. THE NINTH CIRCUIT DECISION CHILLS THE CENTERS' ABILITY TO COMMUNICATE A MESSAGE CONTRARY TO PREVAILING STATE ORTHODOXY.

Abortion is not the only solution to an unplanned pregnancy. That is the Centers' distinctly *religious* message. This is speech at the heart of the First Amendment:

> Our precedent establishes that private religious speech, far from being a First Amendment

> orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (U.S. 1995) (internal citations omitted).

The State compels a distinctly pro-abortion message that fails to mention other choices.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). California not only "prescribes what shall be orthodox" on a morally hot-button issue, but demands that the Centers publicize this state orthodoxy. It is difficult enough for small religious nonprofits to accomplish their mission in reliance on voluntary contributions. The difficulties may be insurmountable if the Centers cannot communicate effectively with their intended audience.

A. The Centers Are Engaged In Expressive Advocacy On A Matter Of Public Concern.

The Centers promote an ideology on one of the most explosive public issues in America. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps,* 131 S. Ct. 1207, 1215 (2011), quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983). A matter of public concern is "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004); *see also Connick,* 461 U.S. at 146 ("any matter of political, social, or other concern to the community"). Abortion has been a quintessential "matter of public concern" for over four decades. "Adherents of particular faiths"—individuals and organizations such as the Centers—"frequently take strong positions on public issues." *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1973), quoting *Walz v. Tax Com. of New York,* 397 U.S. 664, 670 (1970). The State's efforts to stifle the Centers' religious pro-life message, and compel "the utterance of a particular message favored by the Government, contravenes this principle." *Turner Broadcast Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994). California "may not burden the speech of [the Centers] in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-579 (2011); *Wollschlaeger v. Governor*, 848 F.3d 1293, *38 (11th Cir. 2017).

B. The Disclosures Force The Centers To Become Couriers Of The State's Speech.

The State advances a message about government-subsidized abortions. But rather than use the massive resources at its disposal, California usurps the Centers' limited resources. The mandatory disclosures gobble up space and garble the Centers' message. Instead of hearing a clear pro-life message, the public is confronted with a hodgepodge of pro-abortion and pro-life statements.

The Act stifles the Centers' right to tailor, time, and edit their messages. Regardless of motives, the State "may not substitute its judgment as to how best to speak" for that of the Centers and the women they serve. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). The Centers are entitled to exercise discretion about the "choice of material . . . the size and content . . . and treatment of public issues." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995). The State wrongfully intrudes on this "editorial control and judgment." *Id.* Moreover, editorial rights extend "not only to expressions of value, opinion, or endorsement, but *equally to statements of fact the speaker would rather avoid.*" *Id.* at 573 (emphasis added). Compelled statements of either opinion *or* fact burden protected speech. *Riley*, 487 U.S. at 797-798; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 (2010) (Thomas, J., concurring). Even statutory disclosures that do pass constitutional muster should grant "flexibility to tailor the disclosures to . . . individual circumstances, as long as the resulting statements are substantially similar to the statutory

examples." *Id.* at 1341. The Act is *inflexible*, compelling the exact words and allowing no breathing space for the Centers to craft their presentation, even if the disclosures themselves were justified. The disclosures are so onerous that Centers cannot print advertisements without transgressing the Act.

C. The Licensed Centers Are Not Engaged In Professional Speech Or Conduct.

The Ninth Circuit opinion rests heavily on precedents governing professional speech, asserting that clients come to the Centers "precisely because of the professional services" and specialized knowledge they offer. *NIFLA v. Harris*, *32-33. Even so, this Court should consider "the nature of the speech taken as a whole and the effect of the compelled statement[s] thereon." *Riley*, 787 U.S. at 796. California may not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963). In *Button*, "the Court rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015), citing *Button*, 371 U.S. at 438-439.

The Ninth Circuit splits with the Fourth Circuit when it ignores a key element of professional speech:

> [T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a *paying client* or instead engages in public discussion and commentary.

Moore-King v. Cty. of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added). The Centers are unquestionably engaged in "public discussion and commentary." The court ignores the obvious and briefly brushes over *Moore-King* in a footnote. *NIFLA v. Harris*, *36-37 n. 8.

Even when financial gain is involved, "a speaker's rights are not lost merely because compensation is received." *Riley*, 487 U.S. at 801. As in *Riley*, the mandatory disclosures are necessarily "intertwined with informative and perhaps persuasive speech" (*id.* at 796)—persuasion against abortion and information to facilitate alternatives. Under the Act, women who enter Licensed Centers are confronted with a state pro-abortion message that contradicts the Center's core beliefs and undermines its mission. A woman who enters an Unlicensed Center is greeted by the government's message about what the Center is *not*. The lengthy disclosures, which must appear in all printed and digital advertisements, obscure the Centers' message and mission. In both cases, the State compels conspicuous disclosures about what the Center does *not* do before the Center can explain what it *does* do. The State—not the Center—creates each woman's *first impression* of the Center.

The Ninth Circuit tramples the freedom of professionals and clients to discuss controversial topics like abortion, and it fails to distinguish such discussion from informed consent to a medical procedure. Even if the Licensed Centers were engaged in "professional" speech—a questionable premise at best—professional speech has many dimensions and is likely entitled to "the strongest protection our Constitution has to offer"

when the topic is a public issue like abortion. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). Here the Ninth Circuit departs from recent Eleventh Circuit precedent *and even its own prior case law*:

> The Ninth Circuit recognized that doctor-patient speech (even if labeled professional speech) is entitled to First Amendment protection, and invalidated the policy because it was content- and viewpoint-based and did not have the requisite "narrow specificity." *See Conant v. Walters*, 309 F.3d 629, 637-639 (9th Cir. 2002).

Wollschlaeger, 848 F.3d at *29-30; *see also Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013) ("doctor-patient communications *about* medical treatment receive substantial First Amendment protection"). Here, the disclosures are admittedly content-based, and California's gerrymandered targeting reveals its pro-abortion viewpoint.

Pro Bono Public Interest Advocacy. The Ninth Circuit ignores the distinction this Court carved out for pro bono public interest advocacy. The Centers' message and services are remarkably analogous to *In re Primus*, 436 U.S. 412 (1978), where an ACLU attorney offered free services "to express personal and political beliefs and to advance the civil-liberties objects of the ACLU, rather than to derive financial gain." *Id.* at 422. This Court relied on the speaker's motive to distinguish protected First Amendment expression from commercial or professional activities the government may regulate more freely. *Id.* at 437-438 n. 2. Even if the Centers were engaged in professional speech, their purpose is advocacy—as in *Primus*. The

free services and information they provide are integrally related to the expression of their core beliefs.

Professional Licensing. Courts uphold reasonable regulations on licensed professions that require speech—e.g., law, accounting, medicine.[2] Laws that regulate entry into a profession are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. *Lowe v. Sec. & Exch. Comm'n,* 472 U.S. 181, 228 (1985) (White, J., concurring), quoting *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 239 (1957).

Here, the **Licensed Centers** have already complied with the licensing requirements applicable to the limited services they provide—and unlike other licensing programs,[3] the Act does "dictate the content." This is classic compelled speech. The State

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[2] *Milavetz,* 130 S. Ct. 1324 (bankruptcy attorneys); *Fla. Bar v. Went For It, Inc.,* 515 U.S. at 625-26 (restriction on direct-mail solicitation of accident victims); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626 (1985) (upholding mandatory disclosure that client may be liable for litigation costs, in attorney ads for contingency fee cases); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (in-person attorney-client solicitation); *Lawline v. Am. Bar Ass'n,* 956 F.2d 1378 (7th Cir. 1992) (rejecting challenge to restrictions on the unauthorized practice of law); *Accountant's Soc'y of Va. v. Bowman,* 860 F.2d 602 (4th Cir. 1988) (accounting terms and standards for licensed CPA's).

[3] *See, e.g., Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1056 (9th Cir. 2000) ("California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional.")

commandeers the Centers to disseminate a government message antithetical to their core mission. The **Unlicensed Centers** are not subject to any licensing requirement. None of the Centers "purport to exercise judgment on behalf of [a] client in the light of a client's individual needs and circumstances." *Lowe v. SEC,* 472 U.S. at 232 (White, J., concurring). All of them are engaged in expressive advocacy on a public issue with significant moral, religious, and political ramifications—not a profession that the State may regulate. They offer free information and services to empower *the women themselves* to make informed decisions about their pregnancies. "This mere provision of information would not seem to be enough to create the type of quasi-fiduciary relationship contemplated by the *Lowe* and *Thomas* concurrences." *Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 456, 467 (D. Md. 2012); *see Lowe v. SEC,* 472 U.S. at 232 (White, J., concurring) and *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("It cannot be the duty, because it is not the right, of the state to protect the public against false doctrine").

Even truly professional speech may trigger "a collision between the power of government to license and regulate . . . and the rights of freedom of speech." *Lowe v. SEC,* 472 U.S. at 232 n. 10 (White, J., concurring) (non-personalized newsletters with investment advice are not professional speech). Occupational regulations are valid only if "[a]ny abridgement of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. at 467-468. The Act's constitutionally flawed burdens can hardly be deemed *incidental*.

D. The Centers Have No Economic Interests At Stake And Do Not Engage In Commercial Transactions With The Women They Serve.

The Ninth Circuit rejected the State's argument that the Centers are engaged in commercial speech. But even if it were:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Sorrell, 564 U.S. at 579, quoting *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993). In the commercial setting, it may be possible to "compel disclosure without suppressing speech." *Conn. Bar Ass'n v. United States,* 620 F.3d 81, 93 (2d Cir. 2010). But even there, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer,* 471 U.S. at 651.

The Centers exist to assist women facing unplanned pregnancies and inform them about *choices* other than abortion. At no time do they "propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 64-68 (1983); *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 473 (1989); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013). Their message is not "expression related solely to the economic interests of the speaker and its

audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). It is only through a warped redefinition—equating "the opportunity to advocate against abortion" with economic benefit—that the government could possibly manufacture a "commercial" transaction. *Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011), *aff'd in part and rev'd in part*, 740 F.3d 233 (2014). That fanciful transformation is "particularly offensive to free speech principles." *Id.* at 206. It twists the free services of religious missions and upends the First Amendment:

> [A]ny house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection.

O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 813-814 (D. Md. 2011). Restaurants can be required to disclose caloric and nutritional information. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131-32 (2d Cir. 2009). But it would be flagrantly unconstitutional to impose comparable disclosures on a church operating a soup kitchen to feed the homeless. Restaurants and soup kitchens both provide food—but a church ministry to the poor is not a "commercial" venture subject to the same level of government regulation. To assume that position would "represent a breathtaking expansion of the commercial speech doctrine." *Evergreen*, 801 F. Supp. 2d at 205. Here, the Centers are motivated by

religious beliefs and social concerns, not economic interest.

For many years, "the Constitution impose[d] [no] restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). When this Court expanded protection for admittedly *commercial* speech, the context was abortion. Three decades after *Valentine*, "the notion of unprotected commercial speech all but passed from the scene." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-760 (1976). One of the earliest commercial speech cases held that an out-of-state advertisement for abortion services "did more than simply propose a commercial transaction"—"it contained factual material of clear 'public interest.'" *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). "The fact that the particular advertisement in appellant's newspaper [for legal abortions in New York] had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees." *Id.* at 818. This Court protected the rights of the New York advertiser and distinguished the facts from *Valentine*, where a "message of asserted public interest was appended solely for the purpose of evading the ordinance." *Id.* at 819. A few years later, this Court characterized unsolicited mailings about contraception as commercial speech, after a careful analysis of many factors—and not solely the economic motivation or the reference to a specific product. *Bolger*, 463 U.S. at 66. Even so, the commercial character of the speech did not remove it from the First Amendment:

> [W]here – as in this case – a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount.

Id. at 69, citing *Carey v. Population Services International*, 431 U.S. 678 (1977) and *Bigelow v. Virginia*, 421 U.S. 809. *In spite of classifying the speech as commercial*, this Court struck down the federal statute that prohibited mailing information about contraception because it unreasonably suppressed the flow of information. *Id.* at 72. Here, the Centers' pro-life message is at the heart of their existence, not an afterthought designed to sidestep government regulation. As in *Bolger*, the Centers "desire to convey truthful information relevant to [an] important social issue." The State cannot employ its regulatory authority to shut down speech on either side of the abortion debate. The most it can do is "assess liability for specific instances of deliberate deception"—not "impose a prophylactic rule requiring disclosure even where misleading statements are not made." *Riley*, 487 U.S. at 803 (Scalia, J., concurring).

Commercial speech may be "linked inextricably" with the underlying commercial transaction. The government's interest in regulating that transaction "may give it a concomitant interest in the expression itself." *Edenfeld*, 507 U.S. at 767 (CPA client solicitation). But commercial speech may also be "inextricably intertwined" with expressive speech. In that case, it does not retain its commercial character but instead must be treated as fully protected

expressive speech. This Court declines to "parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley*, 487 U.S. at 796. That is particularly true when the expressive aspect is targeted for regulation. *Riley* built on a principle from an earlier case involving fundraising, where this Court recognized that "[s]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Here, even if the Centers' speech could plausibly be considered either professional or commercial, it is "inextricably intertwined" with "persuasive speech" advocating a "particular view[]" on an important social issue.

Even where regulation of commercial speech is appropriate, the government has limited power to restrict communication that is "neither misleading nor related to unlawful activity." *Central Hudson*, 447 U.S. at 564. The regulation must directly advance a substantial state interest, and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* The framework developed by this Court is "substantially similar to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (internal citations and quotation marks omitted). And "the abiding characteristic of valid time, place, and manner regulations is their content neutrality. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791-796 (1989)." *Id.* at 573 (Thomas, J., concurring). As the Ninth

Circuit acknowledged, California's FACT Act is not content neutral.

E. The Disclosures Shut Off The Free Flow Of Information—The Very Purpose Of Disclosures In Commercial And Professional Contexts.

The First Amendment promotes the free flow of ideas and information. This helps ensure that even commercial decisions are well informed. "To this end, the free flow of commercial information is indispensable." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). *See also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-114 (2d. Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.") Here, decisions about pregnancy are "protected from unwarranted state interference." *Bolger*, 463 U.S. at 69; *see also Carey*, 431 U.S. at 700-701, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 766-767. This principle cuts both ways and protects a woman's choice to learn about alternatives to abortion. And unlike cases involving merely the sale or advertising of a product, the Centers *do* "wish to editorialize on [a] subject"—one that is a matter of grave public concern and heated political debate. *Id.* at 761.

Even if professional or commercial speech were involved, the State mandate thwarts the flow of information that disclosures ordinarily facilitate. The Act purports to ensure that women are fully informed of their reproductive options but in reality it stifles

access to their full range of choices. Its sole focus is the availability of abortion, emergency contraception, and birth control. The State is determined to promote abortion and crafts its message accordingly. *But that does not fully inform women.* The Centers fill the gap by providing "truthful information relevant to [an] important social issue[]." *Bolger,* 463 U.S. at 69. The Centers widen the range of options for women who might otherwise believe abortion is their *only* choice. Their services facilitate the free flow of information. The Act hinders that flow by interfering with the right to *receive* information. "Indeed, the right to hear and the right to speak are flip sides of the same coin." *Conant,* 309 F.3d at 643 (Kozinski, J., concurring) (medical marijuana); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-867 (1982), *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. at 756-757. Contrary to the state's alleged interest in *fully* informing women, the Act imposes restrictions *only* on entities that oppose abortion and mandates *only* disclosures that promote abortion. The Act smothers expression and impedes access to information.

The State equates informed consent disclosures imposed on *physicians* with the mandates imposed on the Centers. The only similarity is that both schemes are related to abortion. The resemblance ends there. Like *any* other surgical procedure, abortion requires informed consent. Without it, the physician could be liable for malpractice. Doctors remain free to advocate abortion or discuss a host of other options with pregnant patients. Informed consent laws are viewpoint neutral and their impact on speech is incidental. California's inflexible mandates are beyond

incidental, drowning out the Centers' pro-life message and even jeopardizing their ability to remain open.

The Ninth Circuit continues the State's charade, citing this Court's decision in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992). *NIFLA v. Harris*, *25 ("[T]he Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion."). The circuit court also references Fourth, Fifth, and Eighth Circuit cases that are anything but analogous to the facts here. *NIFLA v. Harris*, *26 ("courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases"). The Fourth Circuit struck down an informed consent law under intermediate scrutiny. *Stuart v. Camnitz*, 774 F.3d 238, 248-249 (4th Cir. 2014). The Fifth Circuit applied a reasonableness standard to uphold a requirement that doctors show pregnant women sonograms and make audible the fetus's heartbeat. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575-576 (5th Cir. 2012). The Eighth Circuit, also using a reasonableness test, upheld the compelled disclosure of "truthful, non-misleading information relevant to a patient's decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-735 (8th Cir. 2008).

The Ninth Circuit admits a "circuit split regarding the appropriate level of scrutiny" (*NIFLA v. Harris*, *26) but misses the elephant in the room: Unlike *Stuart*, *Lakey*, *Rounds*, or *Casey*, the Act contains no informed consent provision. The court masks the difference by using the broad term "abortion-related disclosures." Informed consent laws facilitate the free flow of information by equipping patients with critical

information they need in order to consent to a medical procedure. Here, the Act's disclosures are unrelated to any risk associated with services the Centers offer. If ultrasounds or pregnancy tests posed a health risk, the State could require disclosure of that risk. Instead, the State mandates dissemination of information about a procedure the Centers *oppose* and would never recommend or perform—abortion. That is just as illogical as it is unconstitutional.

Occasionally courts recognize expanded First Amendment protection for new categories of speech. This enhances the free flow of information. In fact, the protection currently enjoyed by commercial speech was forged in the context of disseminating information about abortion services (*Bigelow v. Virginia,* 421 U.S. 809) and contraception (*Bolger,* 463 U.S. 60). But courts cannot exercise "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens,* 130 S. Ct. 1577, 1586 (2010). That is exactly what the Ninth Circuit has done. The "new category" it expunges is pro-life speech offering free information about life-affirming alternatives to abortion.

The Ninth Circuit's departure from its own precedent is startling. In a case *not* related to abortion, the circuit court stated that: "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Conant*, 309 F.3d at 636. In *Conant*, the court enjoined a federal law that allowed revocation of a physician's license for recommending medical marijuana. The law impermissibly "condemn[ed] expression of a particular

viewpoint." *Id.* at 636. The decision acknowledged that the government must respect First Amendment rights even in the context of requiring informed consent. *Id.* at 637 ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights.") The State's authority to regulate commercial or professional speech does not, under any standard, grant the government carte blanche to skew disclosures in favor of one side of a heated public debate and destroy the mission of those who disagree with its viewpoint.

III. THE NINTH CIRCUIT CRIPPLES THE CENTERS' ABILITY TO CONTINUE THEIR *METHOD* OF OFFERING FREE RESOURCES.

The Centers and the State each have a method to accomplish their respective missions. The Centers' method is to offer free information and resources, including limited, non-surgical medical services such as pregnancy tests and ultrasounds. The State has a constitutionally flawed method—rather than using its own funds and voice, California confiscates the Centers' limited resources and compels them to spread a government message that conflicts with their mission. And while the State claims its purpose is to prevent deception and ensure that women are fully informed about their reproductive choices, its method betrays that claim. The State informs women about *only one* choice—abortion—and deceives women by using pro-life speakers as its mouthpiece. The State abuses its power by enacting laws that distort the Centers' message, crippling their ability to speak and otherwise carry out their mission.

The Act turns free speech jurisprudence on its head. Its burdensome disclosures are broadly tailored, using the most restrictive means to accomplish the State's viewpoint-based objective. The State defies this Court's precedent by imposing these disclosures as its *first* line of attack:

> If the First Amendment means anything, it means that regulating speech must be a *last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.*

Thompson v. Western States Medical Ctr., 535 U.S. 357, 373 (2002) (emphasis added); *see also Conant*, 309 F.3d at 637. Rather than use its own voice, the "first strategy the [State] thought to try" was requiring the Centers to become ventriloquists and bear the costs of transmitting its message. Even in the commercial context, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Cent. Hudson,* 447 U.S. at 564. The State has a wealth of more narrowly tailored means available—starting with its own voice and resources. *See, e.g., Riley,* 487 U.S. at 800 ("the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file").

The State can adopt, promote, publicize and even fund a viewpoint. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S.

173, 193 (1991). In *Rust*, the government funded family-planning services but chose to exclude abortion. *Id.* at 178. The government may appropriate public funds for a program, and when it does, it may define the limits of the program. *Id.* at 194. But the Act unconstitutionally compels the Centers to expend their limited resources to be a conduit for the State's own message, compromising "the core principle of speaker's autonomy" (*Hurley*, 515 U.S. at 575) and "assum[ing] a guardianship of the public mind" (*Riley*, 487 U.S. at 791, quoting *Thomas v. Collins*, 323 U.S. at 545 (Jackson, J., concurring)).

The Constitution severely restricts the State's ability to compel speech. Under narrow circumstances, the government may protect the public by requiring disclosures. But even in a commercial context, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. That would be true here *even if* the Centers' speech were "commercial"—which the Ninth Circuit admits it is not. *NIFLA v. Harris*, *19 n. 5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review.").

In upholding California's flawed method of pursuing its mission, the Ninth Circuit generates a split with the Second Circuit. That circuit expressed concerns about laws "requir[ing] pregnancy services centers to advertise on behalf of the City." *Evergreen Ass'n*, 740 F.3d 233, 250 (2d Cir. 2014). This "offends the Constitution even if it is clear that the government is the speaker." *Id.*, citing *Wooley v. Maynard*, 430 U.S.

705, 715 (1977) (invalidating statute that turned "private property [into] a mobile billboard for the State's ideological message"). Even if a message appears benign or is acceptable to some, the State's interest does not "outweigh the [Centers'] First Amendment right to avoid becoming the courier for such message." *Id.* at 717. Even seemingly innocuous content-based laws can too easily cross the threshold into viewpoint discrimination. Such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641. That is exactly what California does—in conflict with this Court:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. at 579. The FACT Act contravenes the basic presumption "that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791. Moreover, the State fails to publicize its own message, instead *inflicting the entire burden on the Centers*.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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